In The

Supreme Court of the United States

October Term, 1977

No. 77-158

NORFOLK AND WESTERN RAILWAY,
Petitioner,

v.

RALPH J. WHITE, III,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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July 29, 1977

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Petitioner respectfully seeks the grant of a writ of certiorari, vacation of the judgment below, and remand of the case to the Supreme Court of Virginia for further consideration in light of *Northeast Marine Terminal Co., Inc.* v. *Caputo,* 45 U.S.L.W. 4729 (1977), Nos. 76-444 & 76-454, decided on June 17, 1977.

OPINION BELOW

The opinion of the Supreme Court of Virginia is reported at ..... Va. ....., 232 S.E.2d 807 (1977), and is reproduced

as the Appendix to this petition. The case was commenced in the Circuit Court of the City of Norfolk, where it was dismissed without opinion.

JURISDICTION

The judgment of the Supreme Court of Virginia was entered on March 4, 1977. On May 6, 1977, Mr. Chief Justice Burger signed an order extending the time for filing a petition for a writ of certiorari to and including August 1, 1977. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Whether respondent White was an "employee" within the meaning of that term in the Longshoremen's and Harbor Workers' Compensation Act when he sustained a hearing loss as a result of maintaining electrical equipment used in the process of loading coal on board ships in the Norfolk harbor.

STATUTE INVOLVED

Section 2(3) of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 86 Stat. 1251, 33 U.S.C. § 902(3) (Supp. V 1975) provides in part:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations . . ..

Section 5 of the Act, 44 Stat. 1424, as amended, 86 Stat. 1263, 33 U.S.C. § 905 (Supp. V 1975) provides in part:

> The liability of an employer . . . shall be exclusive and in place of all other liability of such employer to the employee . . ..

STATEMENT OF THE CASE

Petitioner Norfolk and Western Railway is a major coal carrier.[1] It operates the Lambert's Point marine terminal in Norfolk, Virginia. The terminal includes railyards, dockside installations, and piers extending into the navigable waters of the Elizabeth River. Respondent Ralph J. White, III, works at the Lambert's Point facility. His job is to service the massive electrical machinery used to transfer coal from railroad cars to waiting vessels. In 1976, Norfolk and Western loaded more than 25 million tons of coal for shipment all over the world.[2]

Respondent claims to have suffered a hearing loss over a period of about two years while working with the electrical equipment that moves the coal. The coal is loaded on the ships from Pier 5 and Pier 6. Because the loading process is different at these two piers, separate attention to Mr. White's responsibilities at each pier is required.

Pier 6 is where most of the loading occurs. Mr. White's involvement in the loading process at Pier 6 begins when fully-loaded railroad cars arrive at the Barney dumper house, which is located about 425 feet from the piers. The Barney dumper house consists of an electrical room and enormous machinery which turns the loaded railroad cars over and dumps the coal into receiving bins. The coal then proceeds by way of conveyor belts to the BC transfer house, which is located approximately 75 feet from the head of Pier 6. The BC transfer house contains an electrical room which supplies the power to operate the system of

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[1] The facts of the case are essentially undisputed. As recited here, they are derived from the opinion of the Supreme Court of Virginia which is attached as the Appendix and from the undisputed evidence presented at the hearing described at page 6, *infra*.

[2] *See* Hampton Roads Maritime Association, 1977 Annual of the Port of Greater Hampton Roads.

conveyor belts. When the coal leaves the BC transfer house, it continues on the conveyor belts until it reaches the pier.

Pier 6 is equipped with two shiploaders. A shiploader is a structure some 196 feet high which is designed to receive the coal from the conveyor belts and transfer it into a ship's hold by means of a telescoping chute. A Norfolk and Western deck foreman supervises the operation of the shiploader from the deck of the vessel. He coordinates with the captain and chief officer of the vessel and specifies the direction of the loading. The actual operator of a shiploader sits in a cab about 60 feet above the deck of a ship during the loading process. The electrical room in each shiploader is located about 50 feet above the operator's cab or a total of 113 feet above the pier and the deck of a waiting vessel.

Norfolk and Western is also responsible for "trimming" the ship, that is, for distributing the weight of the coal properly so that the ship will not list. This is accomplished in part by an hydraulic "trimming" system located near the bottom of the chute which feeds the coal into the ship's hold. This hydraulic system is also operated by electrical power.

Mr. White maintains the electrical facilities at the Barney dumper house electrical room, at the BC transfer house electrical room, and at the electrical rooms located in each of the shiploaders. He spends the majority of his time at these facilities. In addition, Mr. White uses walkways along the conveyor belts to reach two additional conveyor belt drive motors. Moreover, his duties at the shiploaders include electrical maintenance of the telescoping chutes and their hydraulic "trimming" systems. When a ship is not being loaded, he performs this function from a maintenance platform that is extended partly over the pier and partly over the water. The platform is about 25 feet above pier level. If

a malfunction occurs while a ship is in berth, Mr. White is required to board the vessel and make the necessary repairs so that coal can continue to flow properly into the ship.

Pier 5 is a secondary facility which uses a loading process that is not assisted by shiploaders. The electrical equipment at Pier 5 raises a single coal car and dumps the coal into a pan from which it flows by gravity into the ship's hold. Mr. White's duties at Pier 5 consist of maintaining equipment in the motor house electrical room as well as other electrical equipment actually on the pier. The machinery on the pier is complex and massive. Access is difficult and usually requires that Mr. White board a floating barge in order to be taken to the point of trouble.

The present case was begun under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60, in the Circuit Court of the City of Norfolk. Mr. White alleged that he suffered a hearing loss due to the noise conditions at the electrical rooms in the Barney dumper house, the BC transfer house, the two shiploaders on Pier 6, and the motor house on Pier 5. The case was tried to a jury and, after a verdict was returned for the defendant, the trial judge ordered a new trial on plaintiff's motion.

At this point, the petitioner Norfolk and Western Railway was notified by the Office of Workers' Compensation Programs, United States Department of Labor, that Mr. White and others[3] involved in the coal-loading process came within the coverage of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950. Because compensation remedies under that Act are "exclusive" under Section 5 and "in place of all other liability of such employer,"[4]

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[3] *See* note 22, *infra*.

[4] Section 5 of the Act, 33 U.S.C. § 905, is quoted in pertinent part at page 2, *supra*. This Court has held that the Longshoremen's Act

petitioner railroad filed a motion to dismiss the FELA action and thereby sought a determination as to the appropriate federal remedy governing its potential liability. After a hearing, the trial judge granted the motion to dismiss without opinion.

The Supreme Court of Virginia granted a writ of error and reversed. That Court held, as was undisputed, that the railroad was an "employer" within the Longshoremen's Act[5] and that the injury occurred within the "situs" requirement of the Act.[6] It reversed and remanded for a new trial, however, on the ground that Mr. White did not meet the "status" requirement of the Act. That is, the Court held that Mr. White was not a covered "employee" within the statutory definition of a person "engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations . . . ."[7] Though the case has been remanded for a new trial, the judgment of the Supreme Court of Virginia is nevertheless a "final judgment" under 28 U.S.C. § 1257 as interpreted by this Court.[8]

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precludes recovery under the FELA in cases to which the Longshoremen's Act is applicable. *Pennsylvania Railroad Co.* v. *O'Rourke,* 344 U.S. 334 (1953); *Nogueira* v. *N.Y., N.H. & H.R. Co.,* 281 U.S. 128 (1930).

[5] *See* App. 9.

[6] *See Id.*

[7] Section 2(3) of the Act, 33 U.S.C. § 902(3), imposes this requirement and is quoted in pertinent part at page 2, *supra.*

[8] The applicable principle was stated in *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 482-83 (1975), as follows:

> Lastly, there are those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state-court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation.

See also Construction Laborers v. *Curry,* 371 U.S. 542 (1963); *Mercantile Nat'l Bank* v. *Langdeau,* 371 U.S. 555 (1963). This case differs from *Cox* only in the obviously immaterial respect that the issues remaining for litigation here involve federal rather than state questions. As in *Cox, Curry, and Langdeau,* however, the petitioner Norfolk and Western Railway claimed in the Virginia courts a federal ground that would be preclusive of any further litigation on the relevant cause of action and this federal ground has been presented to and finally determined by the state courts for purposes of the state litigation.

REASONS FOR GRANTING THE PETITION

The opinion below was rendered on March 4, 1977. Three months later, on June 17, 1977, this Court decided *Northeast Marine Terminal Co., Inc.* v. *Caputo,* 45 U.S.L.W. 4729 (1977), Nos. 76-444 & 76-454. The *Caputo* case resolved a conflict among the Circuits over the coverage of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act. This petition for certiorari is sought because the opinion below is inconsistent with the decision of this Court in *Caputo.*

The Supreme Court of Virginia regarded as dispositive the fact that Mr. White was "not actually handling any cargo, either manually or mechanically" and that he was therefore "at least one step removed from a realistically significant relationship [to the loading of cargo on ships] and from a direct involvement with the loading of vessels."[9] Both the reasoning of the Supreme Court of Virginia and the authority on which it relied have been undercut by

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[9] App. 13.

Caputo. Two of the three principal precedents for the decision below were vacated and remanded for reconsideration in light of *Caputo*.[10] The third was regarded by the Solicitor General as wrongly decided[11] but was not before the Court at the time of *Caputo*. More importantly, this Court's analysis in *Caputo* plainly contradicts the restrictive view of the scope of the Longshoremen's Act adopted by the Supreme Court of Virginia.

As construed in *Caputo*, the 1972 Amendments to the Longshoremen's Act considerably expanded its coverage. *Caputo* involved claims by two employees, neither of whom

[10] *I.T.O. Corp.* v. *Benefits Review Board*, 529 F.2d 1080 (4th Cir. 1975), aff'd in part by an equally divided court and rev'd in part on rehearing, 542 F.2d 903 (1976), cert. granted, judgment vacated, and case remanded *sub nom. Adkins* v. *I.T.O. Corp.*, 45 U.S.L.W. 3839 (1977); *Jacksonville Shipyards, Inc.* v. *Perdue*, 539 F.2d 533 (5th Cir. 1976), cert. granted, judgment vacated, and case remanded *sub nom. P. C. Pfeiffer Co., Inc.* v. *Ford and Director, Office of Workers' Comp. Programs* v. *Jacksonville Shipyards, Inc.*, 45 U.S.L.W. 3839 (1977).

[11] *Weyerhaeuser Co.* v. *Gilmore*, 528 F.2d 957 (9th Cir.), *cert. denied* 45 U.S.L.W. 3254 (1976). The Solicitor General argued in his brief in the *Caputo* case, at page 29 n.20, that *Weyerhaeuser* was wrong because it terminated coverage of persons who would have been covered under the Act before its amendment in 1972. This Court found it unnecessary to address this point in *Caputo*. *See* 45 U.S.L.W. at 4733 n. 25.

There are two additional reasons why *Weyerhaeuser* is an inapt precedent for the present case. First, the cases bear no similarity on their facts. The employee in Weyerhaeuser worked as a "pond man" in an enclosed portion of a bay. He sorted debarked logs and fed them into a sawmill. His work had no hint of connection with shipping, longshoring, or any related activity. He was simply a participant in a manufacturing process. By contrast, the least that can be said of Mr. White is that he engages in physical labor at the scene of ship-loading activity to enable that process to take place. The second factor undercutting *Weyerhaeuser* is that the court limited its construction of the Act to protection against the "traditional hazards" of "the perils of the sea and an unseaworthy vessel." 528 F.2d at 961. This language has been contradicted by the decision in *Caputo*. Neither of the persons involved there were injured by such hazards.

would have been entitled to benefits prior to the 1972 Amendments. Blundo was injured while checking cargo being "stripped" from a large container. The container had been unloaded from a ship several days earlier and moved overland to a different pier. Caputo was hurt while loading a consignee's truck some five days after the cargo involved had been removed from a vessel. This Court held both workers covered under the amended Act. Comparison of Mr. White's activities with those of Blundo and Caputo makes it plain that he too is covered by the Act.

With respect to Blundo, the Court emphasized Congress' intent to "adapt the LHWCA to modern cargo handling techniques" and to include within the Act tasks which are "clearly an integral part of the unloading process as altered by the advent" of such techniques.[12] In Blundo's case, modern containerization had shifted much of the longshoreman's traditional function to land. Similarly, in Mr. White's case, mechanization of bulk cargo loading has changed the character of work performed by persons who accomplish such loading. Mr. White's duties require that he work on, over, and around the ships receiving coal for export. Plainly, the employee who operates a shiploader from a cab 60 feet above the waiting vessel would be engaged in the loading process as modified by modern cargo-handling techniques. Mr. White's work in the electrical room high above the operator's cab is just as "clearly an integral part" of that mechanized loading process. He is exposed to the same dangers as is the operator, and his work is equally essential to loading coal. The same holds true for Mr. White's work at the Barney dumper house and the BC transfer house. Both facilities are essential to continuous movement of coal to waiting vessels. Without Mr. White's assistance on

[12] 45 U.S.L.W. at 4735.

the scene, the process of loading coal would come to a halt. Like his co-workers who operate the shiploaders and other machinery, and like Blundo, Mr. White is performing manual labor in a maritime setting with the objective of moving cargo on or off a ship.

With respect to Caputo, this Court emphasized the Congressional intent in enacting the 1972 Amendments "to provide continuous coverage throughout their employment to these amphibious workers who, without the amendments, would be covered only for part of their activity."[13] Mr. White falls squarely within this policy. Like Caputo, Mr. White is an amphibious worker whose function is essential to the physical process of loading ships. He spends about one-third of his time in shiploaders extended high above the deck of a waiting vessel. He also works on a maintenance platform suspended over navigable water. He is required to board ships during the loading process in order to repair "trimming" equipment on the coal chute and to board a barge in order to gain access to the electrical equipment located on Pier 5. In short, Mr. White's function is to be present on the scene to insure that the process of loading coal on ships will be completed. Also like Caputo, Mr. White would have been covered, without the 1972 Amendments, for only part of his activity. Some of the duties described above would have come within the protection of the Act even before the 1972 expansion in coverage. As this Court explained with reference to Caputo, the Act should be construed so that persons engaged in the loading process will not walk in and out of coverage in the course of a day's work and be exposed to the "shifting and fortuitous coverage that Congress intended to eliminate"[14] by passage

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[13] *Id.*

[14] *Id.* at 4736.

of the 1972 Amendments. This reasoning applies with equal force to Mr. White. It is true, of course, that he does not physically lift cargo in the mold of the classic longshoreman. The entire purpose of mechanization is to avoid manual labor of that type. Mr. White's work is just as integral a part of the process of loading cargo and falls just as plainly within the policy of continuous coverage for amphibious workers who would have been covered for only part of their activities without the 1972 Amendments.

This suggests an even broader objection to the decision of the court below. If it were allowed to stand, that decision would withdraw from the coverage of the Act a substantial class of employees who enjoyed its protections prior to the 1972 Amendments. Before that date, Mr. White and other maintenance personnel were entitled to compensation under the Act if injury occurred on navigable waters, including any dry dock.[15] By its restrictive focus on those who are "actually handling . . . cargo, manually or mechanically,"[16] the decision of the Supreme Court of Virginia would exclude from coverage the entire class of maintenance personnel, as well as line tenders,[17] deck foremen, and others who are an integral part of the loading process but who do

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[15] For example, in *Flowers* v. *Travelers Ins. Co.*, 258 F.2d 220 (5th Cir. 1958), the court upheld an award to a welder injured while making repairs on a floating dry dock. Other maintenance personnel hurt on dry docks were compensated under the Longshoremen's Act in *DeMartino* v. *Bethlehem Steel Co.*, 164 F.2d 177 (1st Cir. 1947), and in *Travelers Ins. Co.* v. *McManigal*, 139 F.2d 949 (4th Cir. 1944). Furthermore, this Court held that a marine railway constituted a "dry dock" within the statute, so that repair and service personnel hurt there were also covered. *Avondale Marine Ways, Inc.* v. *Henderson*, 346 U.S. 366 (1953).

[16] App. 13.

[17] Line tenders are electrician's helpers and others who secure the ship to the dock in order to prepare for loading.

not actually "handle" cargo. This narrowing interpretation conflicts with the conclusion of this Court in *Caputo* that "the language of the Amendments is broad and suggests that we should take an expansive view of the extended coverage."[18]

It is important to note that the class of workers that would be excluded from the Act by the decision in the court below is not limited to maritime employees of railroads. The exclusion from coverage would extend to maintenance and other personnel not actually handling cargo without regard to the character of their employers. With respect to non-railroad employees, the decision of the Supreme Court of Virginia would revive the very chaos that the 1972 Amendments were designed to resolve. If such employees were hurt on the shoreward side of the gangway, they would be relegated to the haphazard pattern of inadequate benefits afforded by state workmen's compensation schemes. On the other hand, if such employees were injured on the ship itself, they would have a federal remedy, although quite a different one than Congress intended. The maintenance man who is injured on board a vessel may recover full damages from the vessel's owner under the essentially strict liability doctrine of unseaworthiness.[19] If the employee were held excluded from the Act, the ship's owner could then secure indemnification from the stevedoring employer,[20] thus resulting in unlimited damages paid by the employer without proof of fault. This uncertain boundary between state and federal remedies is not the scheme that Congress intended. For a very substantial class of work-

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[18] 45 U.S.L.W. at 4734.

[19] *See Seas Shipping Co., Inc.* v. *Sieracki,* 328 U.S. 85 (1946).

[20] *See Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S.S. Corp.,* 350 U.S. 124 (1956).

ers, therefore, the decision of the Supreme Court of Virginia would recreate the evils that Congress meant to eliminate by the 1972 Amendments and that this Court sought to avoid by its decision in *Caputo.*[21]

With respect to maritime employees of railroads, the decision of the court below would create a different but equally serious problem of disparity. Even if excluded from the Longshoremen's Act, Mr. White and other railroad employees would have a remedy under the FELA in addition to the state workmen's compensation statutes and the admiralty action described above. The result would be disparity of coverage between workers on the same site, laboring to the same purpose, and exposed to the same risks of injury. Even under the restrictive interpretation of the court below, those who actually operate the loading machinery or otherwise "handle" coal would be covered exclusively by the Longshoremen's Act. They would enjoy the guaranteed benefits provided by that statute but would not have an opportunity to recover unlimited damages under the FELA.

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[21] Indeed, respondent White would appear to come within the tests for coverage under the Act advanced by both parties in the arguments of the *Caputo* case. The Solicitor General argued in his brief that "Congress used 'maritime employment' . . . to include all physical tasks performed on the waterfront, and particularly those tasks necessary to transfer cargo between land and water transportation." Brief of the Solicitor General in *Northeast Marine Terminal Co., Inc.* v. *Caputo,* No. 76-444, at 25. Later, the Solicitor General argued that the 1972 Amendments "were intended to create a uniform and adequate system of workers' compensation for workers in waterfront industries, throughout the course of their occupations." *Id.* at 35-36. The petitioner argued in the *Blundo* case that the test should be "whether at the time of injury the worker was taking part in 'activity' . . . which was being carried out in whole or in part over navigable waters." Brief for Petitioner in *International Terminal Operating Co., Inc.* v. *Blundo,* No. 76-454, at 17. Mr. White would seem plainly to come within the Solicitor General's formulation and would even seem to come within the narrow conception of the Act advanced by the petitioner in *Caputo* and rejected by this Court as too limited.

On the other hand, maintenance and other personnel who do not actually "handle" coal would, according to the Supreme Court of Virginia, be excluded from the Longshoremen's Act. They could not avail themselves of the generous benefit schedules provided thereby, but they would have an opportunity to sue under the FELA for unlimited damages on proof of negligence. This disparity contradicts one of the principal purposes of the 1972 Amendments. Congress intended to deal with maritime workers as a class rather than to relegate similarly situated employees to vastly different remedial structures.

The petitioner Norfolk and Western Railway is perfectly prepared to meet whatever obligations it has to Mr. White and to other employees who are injured during the course of the coal loading process, whether it be under the Longshoremen's Act or the FELA. There are reasons of morale, fairness, and ease of administration, however, that suggest the propriety of treating similarly situated employees in the same manner. The Railroad is now in the untenable position of not knowing which of two inconsistent federal remedies applies in this and a series of related cases.[22] For

[22] The record in this case does not contain references to litigation involving other employees. It is a matter of public record, however, that the Norfolk and Western Railway is involved in fifteen additional cases involving issues similar to the present case. Three cases are pending before the Fourth Circuit, ten before the Federal District Court in Norfolk, and two in the state trial courts in Norfolk. Like the present case, each of these actions was brought under the FELA for injuries within the administrative guidelines for determining coverage under the Longshoremen's Act.

The record in this case also does not contain references to other employee injuries required to be reported to the Office of Worker's Compensation Programs by the guidelines supplied to the Railroad. It is a matter of record in that office, however, that the Railway reported some 96 injuries at the Lambert's Point facility during the period July 1, 1976, through June 30, 1977. Most of these injuries were minor and involved no time lost from work. Compensation under the Longshoremen's Act has been paid to ten of these employees.

Most of the injuries for which compensation under the Act has been paid would be excluded from coverage by the Supreme Court of Virginia opinion. All are indistinguishable from the other claims in litigation under the FELA. The Railroad's dilemma is that it does not know how to treat these cases as they arise.

this reason, the petitioner would much prefer that this Court grant the petition for certiorari and decide the case on the merits in order to clarify the appropriate remedial structure within which the Railroad should act. Petitioner recognizes, however, that since the decision of the court below was rendered prior to the decision in *Caputo*, it is the normal practice to afford the court below an opportunity to assess the intervening decision prior to review on the merits. This Court has entered such orders in four other cases since *Caputo* was decided.[23] In recognition of this practice, petitioner is therefore seeking at least the opportunity to present to the Supreme Court of Virginia its arguments that the decision below is inconsistent with the subsequently expressed views of this Court.

CONCLUSION

The petitioner therefore requests that this Court grant the petition for a writ of certiorari, vacate the judgment below, and remand the case for further consideration by the Supreme Court of Virginia in light of *Northeast Marine*

[23] *See* 45 U.S.L.W. 3839 (1977).

Terminal Co., Inc. v. *Caputo,* 45 U.S.L.W. 4729 (1977), Nos. 76-444 & 76-454.

Respectfully submitted,

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July 29, 1977

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of July, 1977, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Henry E. Howell, Jr. and J. Gray Lawrence, Jr., Howell, Anninos, Daugherty & Brown, 808 Maritime Tower, Norfolk, Virginia 23510, Counsel for Respondents. I further certify that all parties required to be served have been served.

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APPENDIX

APPENDIX

RALPH J. WHITE, III

v.

NORFOLK AND WESTERN RAILWAY COMPANY.

Record No. 751407.

Supreme Court of Virginia.

March 4, 1977.

* * *

Before I'ANSON, C.J., and CARRICO, HARMON, POFF and COMPTON, JJ.

COMPTON, Justice.

In this personal injury action brought under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60, we must decide whether, under the circumstances of this case, the exclusive remedy is under the Federal Longshoremen's and Harbor Workers' Compensation Act (LHWCA or the Act), 33 U.S.C. §§ 901-950.

Plaintiff-appellant Ralph J. White, III, filed suit in June of 1974 in the court below against his employer, defendant-appellee Norfolk and Western Railway Company (N&W). During the period of time in question, plaintiff worked as an electrician in rooms housing electrical equipment at defendant's Lambert's Point terminal in Norfolk. Plaintiff alleged defendant negligently failed to furnish him a safe place to work and negligently failed to provide him with protective equipment, and as a result of excessive noise in the electrical rooms he suffered permanent damage to his hearing

and developed a constant ringing in his ears. The FELA case was tried in November of 1974 and the jury found for the defendant. Thereafter, the trial judge sustained plaintiff's motion to set the verdict aside and ordered a new trial.

In June of 1975, shortly before the scheduled retrial, defendant filed a motion to dismiss on the ground the court lacked jurisdiction over the subject matter in that plaintiff's exclusive remedy was under the LHWCA. Following an evidentiary hearing, the trial court sustained the motion. We granted plaintiff a writ of error to the July 29, 1975 order dismissing plaintiff's action.

Enacted in 1927, the LHWCA, like the FELA, is a federal industrial accident statute. The enactment emanated from the problems created when some of the States applied State workmen's compensation acts to claims of longshoremen and other harbor workers. 1 M. Norris, *The Law of Maritime Personal Injuries* 103 (3d ed. 1975).[1] These claims, for the most part, stemmed from injuries aboard vessels in navigable waters and thus were in the distinctly Federal field of maritime torts, even though the claims arose within the territorial boundaries of the States. After the United States Supreme Court, in a line of pre-1927 cases, barred these State awards to maritime workers, Congress enacted this comprehensive maritime workers compensation law.

In 1972, extensive changes were made in the LHWCA. Prior to 1972, the Act provided that compensation was payable only if the claim arose "upon navigable waters" including "any dry dock" and only if recovery for the disability or death could not validly be provided by State law

[1] "The longshoreman, as the name implies, is a shoreside worker whose principal activity is the loading and unloading of ships' cargo." Norris, *supra* at 6.

through workmen's compensation proceedings. The Supreme Court thus construed the earlier act "to reimburse only injuries seaward of the pier, e.g. on shipboard or other like structure within the narrow confines of the admiralty tort jurisdiction." *Stockman* v. *John T. Clark & Son, Inc.*, 539 F.2d 264, 270 (1st Cir. 1976). Before the 1972 amendments, the Act was considered to be a mere "supplement to state workmen's compensation laws, designed not to supersede or improve upon those laws but to fill a gap which the states were without jurisdiction to fill." *Id.* at 270 (footnote omitted). Pre-1972 coverage under the Act was "overwhelmingly situs-oriented." *Jacksonville Shipyards, Inc.* v. *Perdue*, 539 F.2d 533, 537 (5th Cir. 1976). For example, coverage was granted to a longshoreman injured aboard the vessel but denied if his injury occurred several feet from the ship on the pier. 539 F.2d at 270. In *Nacirema Co.* v. *Johnson*, 396 U.S. 212, 90 S.Ct. 347, 24 L.Ed.2d 371 (1969), the claims of three longshoremen were denied when two were injured and a third killed, on piers permanently affixed to the shore, while they were attaching cargo from railroad cars to ships' cranes. The Supreme Court rejected the argument that the 1927 Act provided a broader coverage which was premised on "'status' of the longshoreman employed in performing a maritime contract." 396 U.S. at 215, 90 S.Ct. at 350. The Court noted:

> "Congress might have extended coverage to all longshoremen by exercising its power over maritime contracts.[7] [[7] The admiralty jurisdiction in tort was traditionally 'bounded by locality,' encompassing all torts that took place on navigable waters. By contrast, admiralty contract jurisdiction 'extends over all contracts, (wheresoever they may be made or executed . . .) which relate to the navigation, business or commerce of the

sea.' Since a workmen's compensation act combines elements of both tort and contract, Congress need not have tested coverage by locality alone. As the text indicates, however, the history of the Act shows that Congress did indeed do just that.]" 396 U.S. at 215-16, 90 S.Ct. at 350 (citations omitted).

The Court also observed that movement of the coverage line landward should be accomplished by legislative and not judicial action. 396 U.S. at 224, 90 S.Ct. 347.

The inequities resulting from the fact that coverage under the Act stopped at the water's edge prompted Congress in 1972 to enlarge the scope of the Act. *See* H.R.Rep. No. 1441, 92d Cong., 2d Sess. 10, *reprinted in* [1972] U.S. Code Cong. & Admin. News pp. 4698, 4707-08. By enactment of the 1972 amendments, Congress, *inter alia,* expanded the "situs" requirement; it also enhanced the significance of the "status" requirement by defining the class of persons who are "employees" entitled to coverage under the Act.

Section 3(a) of the Act sets forth the situs where a covered claim must occur, and provides in pertinent part as follows, with the Amendment made in 1972 shown by italics:

> "Compensation shall be payable . . . in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any *adjoining pier, wharf,* dry dock, *terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel*).... 33 U.S.C. § 903(a).

Section 2(3) of the Act defines the status which the employee must occupy to be covered, and provides as follows, with the 1972 Amendment indicated by italics:

> "The term 'employee' *means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term* does not include a master or member of a crew of any vessel, *or* any person engaged by the master to load or unload or repair any small vessel under eighteen tons net." 33 U.S.C. § 902(3).

The Act further provides that an employer, defined in the Act, *id.* § 902(4), shall be liable for compensation of his employees, *id.* § 904, and that such liability shall be exclusive and in place of all other liability of such employer to the employee. *Id.* § 905.

As we turn to the facts, it will become apparent that the critical question presented by this case is whether plaintiff was a "person engaged in maritime employment" and thus an "employee" within the meaning of the Act. To make this determination, a thorough understanding of the coal-loading process from beginning to end, and the plaintiff's function as it relates thereto, is essential; it is also relevant that other N&W employees performed purely maritime work.

The evidence which was developed during the hearing on the motion to dismiss is without substantial conflict. N&W is a rail carrier of coal and operates the Lambert's Point facilities, which include railroad yards and two coal piers, Piers 5 and 6, extending into the navigable waters of the Elizabeth River, a part of Hampton Roads. Pier 5 is about 1000 feet long, Pier 6 is approximately 1600 feet in length with a 200-foot dolphin extension. The coal is brought to Lambert's Point by rail, to be shipped worldwide, from mines in West Virginia, Kentucky and Pennsylvania; it is sent to Norfolk from staging areas in Roanoke and Crewe,

but only when a designated ship is scheduled to arrive at Lambert's Point to receive it.

When the ship's arrival time is known, transfer of the coal from the staging areas to classification or storage yards at Lambert's Point is coordinated by N&W. Upon arrival in Hampton Roads, the vessel stands off Lambert's Point until called to the piers by N&W. Defendant arranges with Curtis Bay Towing Company for tug service to aid in berthing. One of the tugs employed is owned by N&W and operated by Curtis Bay to "service" the coal piers exclusively. As the ship approaches the pier designated by defendant's piermaster, line tenders employed by N&W handle the lines to secure the ship to the pier. These line tenders may be shop helpers, helper machinists, helper electricians, or helpers of any description.

When docking of the vessel is completed, the following procedure is used to transfer the coal from the storage yards to the coal piers and thence into the ship's hold. The loaded coal cars are brought from the classification or storage yards to the Barney or hump yard, so named because its tracks are laid at a 3.5 percent upgrade, by a hump crew composed of an engineer, a fireman, a conductor and two brakemen. The 20 or 30 coal cars are shoved by the hump engine into the yard where the cars' brakes are applied. Individual cars are then uncoupled manually upon orders of a conductor and allowed to roll unassisted down a 1.5 per cent grade over scales which weigh the cars and through the thawing chamber to the Barney Pit where the cars are classified according to point of origin.

After classification, the cars are pushed to the Barney dumper house, approximately 425 feet from the head of Pier 5, where the cars are turned over and the coal shaken into hopper receiving bins, each of which holds 200 tons of coal. A series of conveyor belts transfers the coal from the

dumper to the piers. The A belt carries the coal from the hopper to B belt which runs underground to the BC transfer house approximately 75 feet from the head of Pier 6. The coal is transferred to C belt which feeds belts D and E located within shiploader number 1, one of two shiploaders located on Pier 6. Shiploader number 2 is fed by a similar series of belts designated A1, B1, C1, D1 and E1. A shiploader is a structure, 196 feet in height, affixed to the pier and operated from a cab 60 feet high, which feeds coal from the conveyor belts into the ship's hold by means of a telescoping chute.

The loading operation is a continuous process from the time the cars leave the Barney yard until the coal drops into the ship. During the process, a deck foreman, employed by N&W is stationed on the vessel. He supervises the operator of the shiploader, keeps in close touch with the chief officer and captain of the ship, and specifies the direction the coal should flow into the ship's hold.

N&W also provides trimming service, which is the mechanical placement of coal in the ship's hold. The railway company also owns a floating barge which is used by electricians and machinists to work on the equipment around the coal piers.

We now examine the plaintiff's duties and the electrical functions ca ied on in the rooms in question. Plaintiff alleged his he g loss resulted from his activities in: The Barney dumper house electrical room, the BC transfer house electrical room, the two electrical rooms in the shiploaders on Pier 6, and the Pier 5 motor house electrical room. Electrical equipment in those locations provides the power to control the loading process from the time the coal cars are placed on the Barney dumpers until the coal is loaded into the ships. Plaintiff claims his injury was sustained during a period of about two years when he was working in the

electrical rooms five nights each week. He was originally employed by N&W in 1969 as a line tender, then entered an electrical apprenticeship, and in December of 1972 was assigned by N&W to perform electrical duties in the foregoing specific areas.

The record shows plaintiff did not operate any of the machinery during the loading process, but that he maintained and repaired the electrical room equipment in the named enclosed spaces. In the Barney dumper room, the equipment converted AC power to DC power through a motor generator which in turn furnished the power and control to dump the coal from the cars and the power to move the Barney, which is a mechanical device used to shove the coal cars onto the dumper. In the BC transfer house electrical room, the equipment provided electrical generation and power supply for the B, B1, C and C1 conveyor belts.

Electrical equipment was also located on Pier 5, which unlike Pier 6 was not equipped with shiploaders. The Pier 5 electrical equipment raised a single coal car and dumped the coal onto a pan from which the coal flowed by gravity through a telescope into the vessel.

Electric power operates the Pier 6 shiploaders. The electrical rooms are located above the operator's cab and are about 113 feet above the deck of the pier. Plaintiff worked in these rooms and also on exterior maintenance platforms, which hang partially over the pier and partially over the water. There were electrical "elements" on the Pier 6 telescopic chute which prevented the chute from "going up too high." Around the bottom of the chute was a hydraulic system for trimming, controlled electronically. The chute hung directly in the center of the vessel's hold when the ship was being loaded. If the rotating trim equipment malfunctioned, plaintiff would go aboard the ship to

repair that equipment. When a vessel was not berthed at Pier 6, metal staging on the pier with an exterior platform about 25 feet above dock level was swung out over the water and around the telescopic chute to afford maintenance access by the electricians to the chute's electrical equipment.

Clearly, and no issue is raised as to this, N&W is an "employer" within the meaning of the Act. "Employer" is defined as "an employer *any* of whose employees are employed in maritime employment, in whole or *in part,* upon the navigable waters of the United States (including any adjoining pier, . . .)" *Id.* § 902(4) (emphasis added). *See Nogueira* v. *New York, N. H. & H. R. R.,* 281 U.S. 128, 50 S.Ct. 303, 74 L.Ed. 754 (1930). N&W's employees who manned the barge and tended the lines bring the railway company within the foregoing definition. *See Thornton* v. *Norfolk & W. Ry.,* No. 75-345-N (E.D.Va., *mem. order* Dec. 10, 1975) *interlocutory appeal denied,* No. 75-8433 (4th Cir. March 18, 1976).

In addition, there is no issue that the injury took place in a situs where a covered claim must occur, within the meaning of section 3(a) of the Act. Each of the five electrical rooms, two ashore and three on the piers, in which plaintiff worked were "upon the navigable waters of the United States," defined in section 3(a) as "including any adjoining pier, . . . or other adjoining area customarily used by an employer in loading, . . . a vessel."

Therefore, because plaintiff was injured in a covered situs and because N&W is an "employer" bound under the Act to pay compensation to covered "employees," the issue, as we have stated, is whether plaintiff was an "employee" within the meaning of the Act; specifically whether plaintiff was a "person engaged in maritime employment" under section 2(3). We conclude he was not and reverse.

On brief, defendant argues that "whether or not a person works for a stevedore [plaintiff did not], and whether or not a person belongs to a maritime union [plaintiff did not], if in his employment he performs duties which are necessary to, and integral parts of, the loading of cargo upon a vessel, then such a person is 'engaged in maritime employment' and thus becomes an 'employee' as statutorily defined." N&W contends "plaintiff's duties of maintaining and repairing the motor equipment used to generate electricity for operation of the automatic coal loading apparatus (which he was doing when allegedly injured), put the plaintiff in a class of persons 'engaged in maritime employment.' " The company further urges that:

> "If the dumping equipment, conveyor belts and shiploaders are customarily used in loading coal into the vessels—as surely they are—then those employees who operate and maintain the equipment are engaged in the loading. The plaintiff's connection with these operations is not peripheral. He spends his time in the five locations at the coal piers while the coal is being loaded into the vessels maintaining the efficiency of the loading equipment and serving as a 'trouble-shooter.' When trouble occurs, for instance, he stops the operation and it is not started again except by his action or if the operation stops because of electrical malfunction it is not commenced without the plaintiff's involvement. At times he is located high above and directly over the ship while coal flows from the belts into the shiploader and down into the ship's hold.
>
> "It must be borne in mind also that what generally may be conceived as loading a vessel—the use of slings and pallets, the hoisting and lowering by ship's gear, the stacking and moving of cartons and bales—is no less

> loading because sophisticated equipment and modern loading techniques are used by different people with skills of many kinds."

At the bar, N&W urged us to apply the "functional relationship" test recently used in *Sea-Land Service, Inc.* v. *Director, Office of Workers' Compensation,* 540 F.2d 629, 638 (3d Cir. 1976). Defendant says that because plaintiff's employment involved "working in these motor rooms, all of his activity was 'functionally related' to the loading of coal on ships; none of his activity was 'functionally related' to the operation of trains or to the operation of a railroad in the sense of moving cars along rails."

A close examination of plaintiff's precise duties, and their relation to the actual loading of the vessels, when considered with the legislative purpose of the 1972 Amendments, will demonstrate the fallacy of defendant's foregoing contentions.

The Act alone does not provide a satisfactory solution to the question which confronts us, because of the imprecise meaning of "maritime employment," "longshoreman," and "persons engaged in longshoring operations" as used in the statute. *See I. T. O. Corp.* v. *Benefits Review Board,* 529 F.2d 1080, 1084 (4th Cir. 1975), *reheard en banc, aff'd. in part by an equally divided court and rev'd in part,* 542 F.2d 903, at 905 (1976). Consequently, the legislative history of the Amendments must be considered to ascertain the intent of Congress. This intent has been aptly summarized in *Weyerhaeuser Co.* v. *Gilmore,* 528 F.2d 957 (9th Cir. 1976), a case in which the sole issue also was whether the claimant, at the time of the injury, was an employee "engaged in maritime employment" within the meaning of section 2(3) of the Act. In holding the claimant was not so engaged, the court stated:

"The 1972 amended prerequisite of 'maritime employment' is a clearly expressed congressional perpetuation of the essential element of admiralty jurisdiction over the employee. In other words, the fixed federal compensation is provided in lieu of the uncertainty of a recovery by an injured ship worker for a maritime tort. The occupational hazards intended to be guarded against are the traditional hazards to the ship's service employee arising in the course of his employment; *i.e.*, the perils of the sea and an unseaworthy vessel recognized under maritime laws. Accordingly we believe that to be entitled to the benefits of [the Act], an employee's employment must have a realistic relationship to the traditional work and duties of a ship's service employment. Otherwise the clear and unambiguous congressional language of 'maritime employment' is nullified and rendered to read 'any employment.'

"We hold that for an injured employee to be eligible for federal compensation under [the Act], his own work and employment, as distinguished from his employer's diversified operations, including maritime, must have a realistically significant relationship to 'traditional maritime activity involving navigation and commerce on navigable waters,' with the further condition that the injury producing the disability occurred on navigable waters or adjoining areas as defined in § 903. [Citations omitted]" *Id.* at 961.

For a comprehensive analysis of the legislative history of the 1972 Amendments, see *I. T .O. Corp.* v. *Benefits Review Board,* 529 F.2d at 1085-87.

Applying the section 2(3) language defining "employee" in the light of what we perceive to have been Congress' purpose when the 1972 Amendments were adopted, we do

not believe plaintiff's duties, in the electrical rooms where the injury allegedly occurred, had a realistically significant relationship to the loading of cargo on ships. Stated differently, when plaintiff was injured he was not *directly involved* in the loading of coal. *See Jacksonville Shipyards, Inc.* v. *Perdue,* 539 F.2d at 539.

Plaintiff was not actually handling any cargo, either manually or mechanically, as was the case in the decisions principally relied on by N&W.[2] Moreover, plaintiff was not manipulating (except to test) any of the controls of the electrical mechanism, which furnished the power for this automated loading process. Rather, he was only *maintaining* the electrical devices on the shore and attached to the pier, work which is not the traditional work of a ship's service employee. Plaintiff was at least one step removed from a realistically significant relationship and from a direct involvement with the loading of vessels. The mere fact some of plaintiff's cumulative injury was sustained out over the Elizabeth River, while he worked inside the electrical rooms of the Pier 6 shiploaders, does not convert his status from that of a railroad electrician to that of a maritime worker.

For these reasons, we hold plaintiff was not a covered "employee" within the meaning of the Act. Hence, the trial court erred in sustaining defendant's motion to dismiss. Accordingly, the order dismissing plaintiff's FELA action

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[2] *See, e.g., Pittston Stevedoring Corp.* v. *Dellaventura,* 544 F.2d 35 (2d Cir. 1976) *cert. granted sub nom. Northeast Marine Terminal Co.* v. *Caputo,* ..... U.S. ....., 97 S.Ct. 522, 50 L.Ed.2d 607 (1977), in which one claimant, a "checker" of cargo, slipped and fell because of ice on a pier while checking cargo being removed from a container, which had been unloaded from a ship a few days before at another pier; and in which another claimant, a "hustler" operator who moved containers within a terminal, was injured when he placed a container on a receiving platform on a dock in preparation for loading the container aboard the ship.

will be reversed and the case will be remanded for a new trial.

Reversed and remanded.

JUDGMENT

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 4th *day of* March, 1977.

Ralph J. White, III, Plaintiff in error,

against Record No. 751407

Norfolk and Western Railway Company, Defendant in error.

Upon a writ of error to an order entered by the Circuit Court of the City of Norfolk on the 29th day of July, 1975.

This day came again the parties, by counsel, and the court having maturely considered the transcript of the record of the order aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the said order is erroneous. It is therefore adjudged and ordered that the same be reversed and annulled, and the case is remanded to the said circuit court for a new trial in accordance with the views expressed in the said written opinion of this court.

And it is further adjudged and ordered that the plaintiff in error recover of the defendant in error his costs by him expended about the prosecution of his writ of error aforesaid here.

Which is ordered to be certified to the said circuit court.

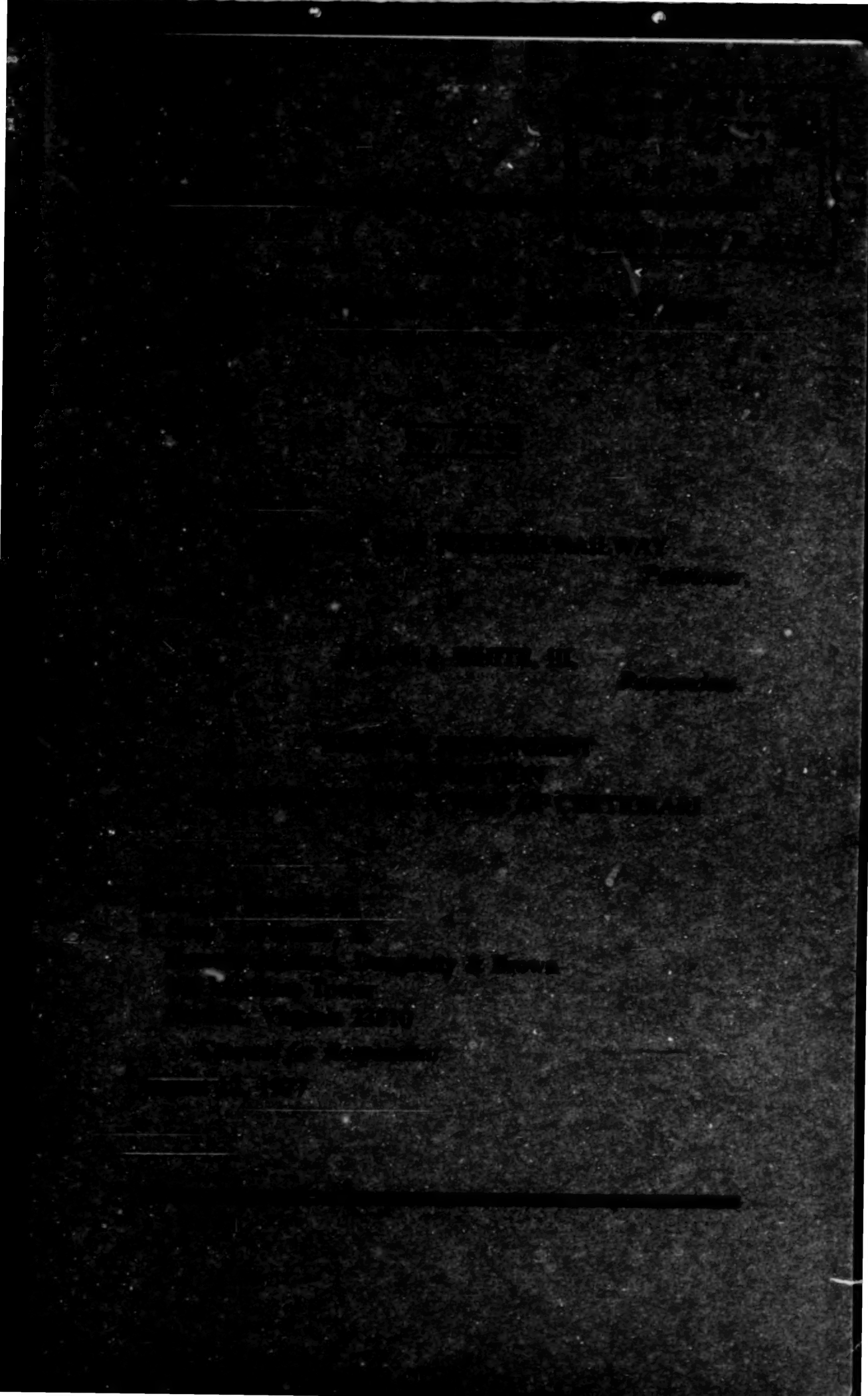
A Copy,

Teste:

/s/ H. G. Turner
Clerk

This mandate has not been certified to the court below as of July 11, 1977.

/s/ H. G. Turner
Howard G. Turner, Clerk



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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-158

NORFOLK AND WESTERN RAILWAY,

Petitioner,

v.

RALPH J. WHITE, III,

Respondent.

BRIEF OF RESPONDENT RALPH WHITE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

QUESTION PRESENTED

Whether the respondent Ralph White, a railroad electrician, was an "employee" within the meaning of that term in the Longshoremen's and Harbor Workers' Compensation Act (hereafter, "the Act") when he sustained hearing loss in various electrical rooms of the

petitioner, while he was maintaining electrical equipment which provided power to machinery which loaded coal aboard ships at the petitioner's Lamberts Point coal piers, and even though he did not actually operate the loading machinery.

STATUTE INVOLVED

Petitioner's citation of Section 2(3) of the Longshoremen's and Harbor Workers; Compensation Act, 44 Stat. 1424, as amended 86 Stat. 1251, 33 U.S.C.§902(3) (Supp. V 1975) should be expanded to read:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder and shipbreaker...

Section 3 of the Act, 44 Stat. 1426, as amended, 96 Stat. 1251, 1265, 33 U.S.C.§903(a) (Supp. V 1975) should also be included:

> Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury

> occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)...

STATEMENT OF THE CASE

As petitioner states, the facts are essentially undisputed. However, petitioner's statement of the case fails to mention that the respondent Ralph White did not customarily operate, nor was operating at the time of his injuries, any of the machinery which actually transferred coal from one point to another and loaded it on board vessels. Further, no evidence was adduced at the jurisdictional hearing in the Circuit Court of Norfolk as to how much time White spent in electrical maintenance of the telescopic loading chutes and their "trimming" systems nor as to the amount of time spent on vessels when it was necessary to repair the loading chute with a vessel in berth. He also maintained a transformer bank which furnished electrical power to a pusher, a device which indexed the railroad cars to allow the barney to take the cars at the dumper. This transformer bank is located near the thawing chamber, back from the pier area. (For a description of the layout of the Lamberts Point area, see A.6f to

petition for a writ of certiorari) A witness for the petitioner, Mr. Johannes Hoffman, the railroad's assistant general foreman of the piers, testified in August, 1975, that he had seen Ralph White on the railroad's barge only six times that year and did not remember seeing him in 1972, 1973 or 1974. (Suit was filed June 26, 1974, in the Circuit Court of the City of Norfolk.) Petitioner's statement also does not mention that the respondent, as an electrician, was at various times assigned to areas in the petitioner's railroad yard other than the piers. At the time of the trial on the FELA action - in November, 1974 - he was working as an electrician in the petitioner's diesel shop.

THERE IS NO GOOD REASON TO GRANT REVIEW

Petitioner contends that review should be granted to the decision of the Supreme Court of Virginia because of what the petitioner perceives as inconsistencies between the "maritime employment" test of coverage employed by that court and this Court in Northeast Marine Terminal Co., Inc. v. Caputo 45 U.L.L.W. 4729 (1977), Nos. 76-444 and 76-454. In fact, the case was correctly decided by the Virginia Supreme Court in accord with the principles enunciated by this Court in Caputo. Both Caputo and Blundo would be covered under the rationale of the Virginia Supreme Court, as they were by this Court. Far from undermining this Court's definition of "maritime employment", the Virginia Supreme Court

derived principles for determining "maritime employment" in a situation which this Court in Caputo did not have occasion to address, where the work out of which the injury arose was not work which, like longshoring (defined by one commentator as the loading or unloading of ship's cargo, 1 Norris, The Law of Maritime Personal Injuries, (3d ed. 1975), §3, p.6) has traditionally been considered maritime in nature or where, put another way, the injured worker was not directly involved in the loading or unloading process.

Blundo, this Court will recall, was injured when he slipped on ice on a pier while marking cargo stripped from a container. His occupation was that of a cargo checker, which involved breaking the seal on a cargo container which had been unloaded, checking the contents against a cargo manifest, and marking each item of cargo with an identifying number. Caputo was injured while working at "terminal labor" and particularly while rolling a dolly loaded with cheese into a consignee's truck.

In contrast is the case of Ralph White, who never checked cargo nor operated, except occasionally to test, the machinery which loaded coal onto vessels waiting at Pier 5 or 6 to receive it nor ever assisted in loading operations.

The Court in Caputo affirmed an extension of coverage to workers whose duties had always been considered maritime and which had historically been performed within a maritime situs, i.e., upon navigable waters. It was an extension justified by technological

changes in the loading and unloading process; for the essential character of longshoring work, as this Court noted, had not changed, but only its place and procedure. Caputo, supra, at 4735, fn. 32. Such a justification is not applicable here, where the work of Ralph White, the work of a railroad electrician, has never, because of technological progress, moved inland from an historic maritime situs. Petitioner would have this Court extend coverage to workers not traditionally or customarily maritime and, in placing undue influence on what it sees as certain objectives of the 1972 amendments, would write the requirement of maritime employment out of the Act.

This Court has been alert over the years to protect the rights of a railroader under the Federal Employers Liability Act (hereafter, "FELA") 45 U.S.C.§51 et seq. In Urie v. Thompson, 337 U.S.163, 69 S.Ct. 1018, 1030, 93 L.Ed. 1283 (1949) it spoke of "the remedial and humanitarian purpose, and the constant and established course of liberal construction of the Act followed by this Court". The FELA, first passed in 1908 and amended in 1910 and 1939, provides that any common carrier while engaging in interstate or foreign commerce - such as the petitioner Norfolk & Western - shall be liable in damages for personal injuries or death suffered by an employee- such as Ralph White - "resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances,

machinery, tracks, roadbeds, boats, wharves or other equipment" (emphasis added).

While it is conceded that the Longshoremen's and Harbor Workers' Compensation Act is the exclusive remedy as to those employees to whom it is found to apply, even though they may be railroaders, this Court should not be quick to divest Ralph White of his FELA rights when that act, like the Longshoremen's and Harbor Workers' Compensation Act, is a piece of remedial legislation entitled to liberal construction for the benefit of the employee.

This Court, as have other courts which have considered the 1972 amendments, has placed much reliance on the legislative history to determine Congressional intent regarding coverage of the Act. The committee reports are crystal clear that Congress did not intend to cover everyone injured in the "situs":

> The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity. To take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters.

> The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area. The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up stored cargo for further transshipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment... (Emphasis added)

S.Rep. No. 92-1125, 92nd Cong., 2d Sess. 12-13 (1972); H.R. Rep. No. 92-1446, 92nd Cong., 2d Sess., 1972 U.S. Code Cong. & Admin. News, pp. 4707-08. The obvious intention not to cover certain persons, even though engaged in work in the "situs", belies petitioner's contention that this Court apply a "but for"

test of coverage - if loading could not take place but for the activities of the injured person, he should be covered. Clerical employees are obviously an essential part of loading and unloading, and the processes could not operate properly without them; yet, they are not covered. Maher Terminals, Inc. v. Farrell, 548 F2d 478 (3d. Cir. 1977). Although this Court in Caputo noted the Act's emphasis on occupations, it recognized that a worker to be covered by the Act must be engaged in maritime employment at the time of his injuries. Caputo, supra at 4733.

With regard to loading and unloading functions (traditionally the work of the longshoreman), Congress obviously sought to draw the coverage line between those employees directly involved in such functions and those who were not. As Gilmore and Black interpret this intention:

> The line which the Committee Reports evidently sought to draw was between workers who participated directly, or physically, in the specified activities and workers whose jobs require them to be in the same area but who (like clerical workers) do not "physically" participate or who (like truckers) can be thought of as only indirectly involved in the strict maritime phase

of the activity.

The Law of Admiralty (2d ed. 1975), p. 430. The direct-indirect distinction was one which this Court in Caputo did not have to consider. Blundo broke the seals on, and checked the contents of, cargo containers. He checked the contents against the cargo manifest and put an identifying number on each item of cargo. Caputo was physically moving cargo into the truck of a consignee. Thus, both employees were directly involved in the loading and unloading of cargo and, indeed, both actually handled the cargo. In the case at bar, the Virginia Supreme Court was faced with a situation where there was no such direct relationship. The criteria which it adopted are supported in the Committee reports and in Caputo and other decisions of this Court.

In Caputo, this Court noted that Act's emphasis on occupations - longshoreman, harbor worker, ship repairman, ship builder or shipbreaker - 45 U.S.L.W. at 4735, 4736. How then does one define these occupations? The logical manner of doing so would be by referring to their traditional, customary tasks, see the remarks of Representative William Steiger, 118 Cong. Rec. 36385, Part 27 (1972) quoted in Weyerhauser, infra at 960) ("The expansion of coverage is intended to bring about a measure of compensation uniformly applicable to persons customarily considered to be working in the business".) In determining a worker's occupational status, his primary, not his incidental, duties are to be considered, Maher Terminals, Inc. v. Farrell, supra at 478. The petitioner concedes that the majority

of Ralph White's time was spent in the electrical rooms where he suffered his hearing loss maintaining the equipment which furnished power to the loading apparatus. Such work has never been considered a part of any occupation set forth in the Act.

In Seas Shipping Co. v. Sieracki, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946), the warranty of seaworthiness was extended to longshoremen injured pierside because they performed work which was traditionally the work of the ship's service, and performed by members of the crew. This Court has, on several occasions, analyzed the remedies of longshoremen with reference wot the parameters of admiralty jurisdiction, which it has in turn defined by reference to traditional maritime activity. In Victory Carriers, Inc. v. Law, 404 U. S. 202, 92 S.Ct. 418, 30 L.Ed. 2d 383 (1971), it refused to extend the warranty of seaworthiness and federal maritime law to a longshoreman injured pier-side by the pier-based equipment of the stevedore. In doing so, it empha-sized that the reach of admiralty had not historically extended to the land. Part of Congress' concern in passing the 1972 amendments was no doubt to allay the harshness of the rule which provided coverage to workers traditionally within admiralty jurisdiction who, at the moment of their injury, may have walked out of coverage because of the expanded geo-graphical limits which technology had given to their work. This problem was solved by broadening the "situs" area of coverage, not redefining "maritime". The Court also rejected an expansive definition of the loading and unloading process by the Court of Appeals as "difficult to delimit", 92 S.Ct. 418

fn. 14. The same might be said of petitioner's analysis in the instant case. If this Court were to hold the respondent - who was not at the time of his injuries engaged in traditional maritime activity nor directly involved in the loading process, which is a traditional maritime activity - was engaged in "maritime employment", the line which Congress tracked would never be drawn, and the requirement of "maritime employment" rendered a nullity.

In Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 93 S. Ct. 493, 34 L.Ed. 2d 454 (1972), petitioners sought to invoke the admiralty jurisdiction of the federal courts for an action, grounded in negligence, allegedly causing the crash of an airplane into the navigable waters of Lake Erie. This Court there sustained the dismissal of the action, holding that before the maritime jurisdiction of the federal courts could be asserted, there must be a "significant relationship to traditional maritime activity," 93 S. Ct. at 504. No such relationship was found to exist in that case. No such relationship exists here. The decisions are important because it was in the exercise of its maritime jurisdiction that Congress passed the act and the 1972 Amendments, see Weyerhauser Co. v. Gilmore, 528 F. 2d 957, 961 (9th Cir. 1976) cert. denied, ___U.S. _____ (1976); Sea-Land Service v. Director, 540 F. 2d 629, 635 (3d Cir. 1977), and references to that jurisdiction are helpful in defining the term "maritime employment". The court in Weyerhauser and the Supreme Court of Virginia, in positing as an aspect of the "maritime employment" test the requirement of

"realistically significant relationship to traditional maritime activity" were but reiterating the essential basis of Congressional action over "maritime" employees. "Traditional maritime activity" includes the statutory occupational classifications. At the same time it is a convenient and workable yardstick for determining those occupational categories which do not constitute "maritime employment". It would be a novel expansion of the term "longshoreman" or "longshoring operations" that would include Ralph White, a railroad electrician, within it, yet that is apparently petitioner's objective in seeking to characterize Ralph White's activities as essential, integral parts of the loading process.

Weyerhauser accurately give effect to the Congressional intent evident in the Committee Reports and restates the maritime boundaries recognized in previous decisions of this Court. Petitioner's suggestion that the case is wrongly decided because it excludes workers who prior to 1972 may have been included under the mantle of the Act obviously flies in the face of the Congressional intent not to cover some workers injured in the situs area - contrary to the result which would have been reached under the pre-1972 Act - and also the clearly expressed requirement, introduced into the Act for the first time in 1972, that an employee at the time of his injuries be engaged in maritime employment. (Petitioner's complaint, in any event, would not be applicable in the case of the injuries suffered by Ralph White. Those injuries would not be covered under the pre-1972 Act, Nacirema Operating Co. v. Johnson, 396 U.S. 212, 90 S.Ct. 374, 24 L. Ed. 2d 371 (1969), where it was held that

injuries to a longshoreman occurring on a pier were not covered even though the pier extended into navigable waters.) Further, petitioner's characterization of the claimant in that case as one engaged solely in the manufacturing process misreads the case. Logs were transported to the sawmill by a tug and barge and were tied up to floating docks. Weyerhauser employees then moved the logs to the mill for debarking. After debarking, the logs were dropped back into the water, routed to ponds where they were sorted by pondmen such as the claimant and fed into the mill for processing into lumber or plywood. The finished product was then loaded aboard ship. If petitioner's analysis were applied, contrary to its assertion that the case is wrong, the Weyerhauser claimant would be covered under the Act, since he was in in a covered situs and since the loading and unloading processes could not have operated without him. But as the court there found. claimant "had no duties receiving the log rafts at the docks, operating the log broncs, initially moving the logs into the mill for debarking or loading ships with the finished product". This Court denied certiorari. Benedict cites the case as "an illustration of basic principles required for coverage", and believes that the other circuits would not seem to quarrel with the holding, 1A Benedict on Admiralty §16, p.2-3 (1977 Supp.). Weyerhauser's reference to traditional maritime work, in fact, was also made in Stockman v. John T. Clark & Son of Boston, 539 F. 2d 264, 275, 276 (1st Cir. 1976).

Another aspect of the "maritime employment" test, when applied to the typical longshoring functions of loading

and unloading, is the evident Congressional intent to cover employees who, like checkers, are "directly involved" in such functions, see the Committee Reports, quoted supra at page 7 - 8. The language was inserted in the Committee Reports, it may be surmised, to give effect to the Congressional intention to cover traditional maritime activities which had moved into new areas and had adopted new procedures as a result of technological advancements. It does not, obviously, eliminate the necessity of determing what is maritime employment nor detract from the Act's occupational emphasis. It does, on the facts of the instant case, require that the respondent participate directly or physically in the loading process. In truth, Ralph White was at least one step removed from such participation. Petitioner's inclusion of Ralph White in the class of employee "directly involved" in the loading process - as he must be at the least in order to come within the Act - strains the terminology beyond its meaning as evident from the Committee Reports. If Ralph White is directly involved in the loading process, it is difficult to see who would not be.

Petitioner's argument on page 12 of its brief entirely misses the mark. The existence of a shipowner's warranty of seaworthiness is irrelevant to whether or not an employee, at the time of his injuries, is engaged in maritime employment within the meaning of the Act, as is the fact that an "employer" may be an entity other than a railroad. The 1972 Amendments addressed themselves to the unseaworthiness remedy in order to

eliminate the stevedore's liability in an indemnification action by the shipowner who in turn had been held liable to a longshoreman for the unseaworthiness of its (the shipowner's) vessel. Under the new Act, an "employee" no longer has a right of action against the vessel for unseaworthiness, but only for simple negligence. Any negligence of the stevedore is not imputed to the ship. Thus, the longshoreman injured aboard a vessel is placed in the same position as a longshoreman on the land as far as his right of action against third parties is concerned.

Petitioner unduly confines the tests of maritime employment used by the Virginia Supreme Court. Those tests are a realistically significant relationship to the traditional work of loading cargo on ships or a direct involvement in such loading process. On the facts of the case then before it, the Virginia Supreme Court interpreted these tests to mean that Ralph White, to be covered under the Act, would have had to actually handle cargo, manually or mechanically. Expressly distinguished was the work being performed by Blundo, (A. 13, fn. 2, petition for a writ of certiorari).

The petitioner then attempts to describe the alleged disparities which would result if the Virginia Supreme Court's decision is allowed to stand. Some disparities will arise and will continue to arise so long as there is any status requirement in the Act. They will continue to arise so long as "maritime employment" is not construed to mean "any employment." What

petitioner perceives as the uncertain boundary of coverage is but an outgrowth of the less-than-precise meaning of "maritime employment." However, the difficulty in applying the requirement to a given set of facts does not justify not applying it at all.

In a footnote, petitioner alludes to various claims by its employees under the Act or to FELA cases pending in various courts, none of which is in fact or properly would be a part of the record before this Court. Petitioner and the courts in which the FELA cases are being heard now have this Court's Caputo opinion to guide them and presumably will conduct themselves in accordance therewith. To allay petitioner's indecision is hardly a reason for granting review contemplated by Rule 19, Supreme Court Rules.

CONCLUSION

In no sense was Ralph White engaged in maritime employment at the time he suffered his injuries. He was not engaged in work customarily considered to be a part of any of the occupations specified in the Act. He was not a member of any of these occupational categories. He was not doing work which traditionally has been considered maritime activity. He was not directly involved in the loading or unloading process. For these reasons, the petition for a writ of certiorari should be denied. If this Court is inclined to grant certiorari, however, the case should be remanded to the Virginia Supreme Court

so that that court may have an opportunity to reconsider its decision in light of Caputo.

Respectfully submitted,

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August 12, 1977

CERTIFICATE OF SERVICE

I hereby certify that on this 19 day of August, 1977, three copies of the foregoing Brief in Opposition were mailed, postage prepaid, to all counsel of record for the Petitioner. I further certify that all parties required to be served have been served.

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